

VZCZCXYZ0002
RR RUEHWEB

DE RUEHBU #1416/01 2012214
ZNY CCCCC ZZH
R 202214Z JUL 07
FM AMEMBASSY BUENOS AIRES
TO SECSTATE WASHDC 8714

C O N F I D E N T I A L BUENOS AIRES 001416

SIPDIS

SIPDIS

DRL CATHERINE NEWLING
BSC DREW BLAKENEY

E.O. 12958: DECL: 07/19/2017

TAGS: PHUM PGOV KJUS MARR AR

SUBJECT: PUT THEM ON TRIAL: SUPREME COURT OVERTURNS PARDONS
TO MILITARY OFFICIALS ACCUSED OF DIRTY WAR HUMAN RIGHTS
ABUSES

Classified By: Ambassador E. Anthony Wayne for reasons 1.4 (b) and (d)

¶1. (C) Summary and Comment. On July 13, the Argentine Supreme Court overturned a 1989 presidential pardon granted by then President Carlos Menem to General Santiago Omar Riveros, former military official who is accused of crimes against humanity for heading up clandestine detention centers during Argentina's military dictatorship from 1976-83. The decision opens the door to try hundreds of other police and military officials who were specifically pardoned by President Menem for their roles in human rights violations during the 1976-83 military dictatorship. The Court, in a split decision, justified its decision by citing international law which prohibits the pardoning of crimes against humanity committed by state actors.

¶2. (C) While much reaction has been positive, local press, civil society, and a few legal scholars have expressed concern that the Court's decision applies international law retroactively and does not take into account the pardons granted to members of armed guerrilla groups, such as the Montoneros, who are also accused of committing human rights violations during the same time period. They argue that the pardons of both state and non-state actors should be overturned, and that military and ex-guerillas alike should stand trial for crimes against humanity. The decision has prompted two claims in the federal courts calling for an investigation into Dirty War-era crimes committed by individuals linked to the Montoneros.

¶3. (C) That same day, the Supreme Court also issued a decision that states that Congress does not have the authority to prevent an elected official from taking office, even when the official has been accused of crimes against humanity. Although the decision relates to another case, it sets a precedent favorable to ex-police Chief and Deputy-elect Luis Patti, who was prevented by the Chamber of Deputies from taking office in 2005 due to accusations of human rights abuses during the &Dirty War8.

¶4. (C) While the Court's recent decision is an important step in trying to enforce accountability for dirty war excesses, it still leaves unaddressed the question of dealing with the murders and assassinations committed by leftist guerilla groups such as the Montoneros. This decision and subsequent trials are unlikely to cause a backlash in the Argentine military, since the generation implicated in these crimes is largely out of the military and today's military is a professional force, fully subordinate to civilian authority. That said, contacts have told us that many lower-ranking military officials are leaving the military as they do not see much of a future in an institution that has served as Kirchner's political whipping boy since taking office. End Summary and Comment.

Where Previous Administrations Granted Amnesty and Pardons...

¶15. (U) Prior to the return of democracy in Argentina, the military junta that ruled Argentina from 1976-1983 granted a blanket amnesty for all offenses connected to the "Dirty War". Although President Raul Alfonsin revoked that amnesty, pressure from the military was too great. Alfonsin subsequently passed the "Due Obedience" and "Full Stop" laws in 1986 and 1987, respectively. The former granted amnesty to lower-ranking military and security officials for "Dirty War" crimes on the basis that they were carrying out orders. The latter ended further investigations and prosecutions of military, security, and other officials accused of political violence during the military dictatorship. Both of these laws did not, however, apply to the senior military establishment whose trials had already resulted in life imprisonment sentences for most of the military's upper brass. Beginning in 1989, Menem issued ten executive decrees, some of which exclusively pardoned specific military officials and others which not only pardoned specific military officials, but also ex-guerillas that carried out political assassinations, kidnappings, torture, and other crimes during the same era.

...Kirchner Has Sought Legal Means to Reopen HR Trials

¶16. (C) Since taking office in 2003, President Nestor Kirchner has made it a government priority to overturn these pardons in the name of pursuing justice for human rights abuses committed during the dictatorship. (Note: At the time of the dictatorship, both Kirchner and his wife, Senator Cristina Fernandez de Kirchner were Montonero sympathizers.

Some members of his administration are ex-Montoneros, and many more were sympathizers.) In July 2003, President Kirchner repealed a decree blocking extraditions of people accused of human rights violations during the military regime, stating that the courts would decide whether to extradite an individual on a case by case basis. In September 2003, with Kirchner's backing, the Argentine Congress repealed the "Due Obedience" and "Full Stop" amnesty laws. In 2004, the Argentine Supreme Court ruled crimes against humanity are not subject to statute of limitations, and in 2005 declared the amnesty laws as unconstitutional.

A Tale of Two Decisions

¶17. (U) On July 13, the Argentine Supreme Court overturned a 1989 presidential pardon granted by then President Carlos Menem to General Santiago Omar Riveros by a vote of 4-2 with one abstention. General Riveros had been charged with human rights abuses, including running clandestine detention centers during the 1976-83 military dictatorship, but was subsequently pardoned along with 63 other military officials. The decision opens the door for hundreds of other police and military officials who were specifically pardoned by President Menem to be tried for their roles in human rights violations during the dictatorship. The local press has speculated that the decision could possibly pave the way for ultimately overturning the pardon granted to then-dictator General Jorge Videla. Former President Menem has criticized the Supreme Court decision and accused President Kirchner of a vendetta against former members of the military that will only stir up old hatreds. However, much of the press reaction was positive in nature.

¶18. (U) The Supreme Court also issued a decision that states that Congress does not have the authority to prevent an elected official from taking office, even when the official has been accused of crimes against humanity. In 1999, Congress prevented former general Antonio Domingo Bussi,

former governor of Tucuman province and from taking office after winning congressional elections, due to accusations of &ideological falsehood& and &illicit enrichment&. Bussi went on to win the mayor's race for the capital of Tucuman province in 2003, but was indicted by a provincial judge for the 1976 disappearance of a senator one day before he was to take office. He was later arrested in 2003 on the grounds of running concentration camps during the military dictatorship.

His case is still pending in the courts. Although Bussi will not be able to benefit from the decision since his term would have expired in 2003, the decision sets a precedent favorable to ex-police Chief and Deputy-elect Patti, who was also prevented from taking office in 2005 due to accusations of human rights abuses during the &Dirty War&.

¶9. (C) Lower Court Federal Judge Daniel Rafecas told us on July 18 that he while he does not strongly disapprove of the decision, he does believe that many will interpret the decision as excessive judicial interference into the way the legislative branch operates and will likely be challenged by the Congress.

Possible Implications of the Decisions

¶10. (C) Local paper, "Pagina 12", which many Argentines view as the official mouthpiece of the Kirchner government, interviewed Supreme Court President Raul Zaffaroni on the decision. They quote Zaffaroni as saying that the decision does not impact the executive privilege to pardon crimes. Rather, the decision upholds international law, which stipulates that crimes against humanity can not be pardoned and are not subject to statute of limitations. Thus, the President can continue to pardon ordinary crimes, just not crimes against humanity, Zaffaroni reasoned. He also indicated that the Court based its decision on a 2001 Inter-American Court of Human Rights decision in the "Altos Barrios" case of Peru, which ruled that member-states should remove all legal obstacles that impede prosecution of crimes against humanity.

¶11. (C) "Pagina 12" also interviewed Justice Carmen Maria Argibay who voted against the decision. She explained that the issue at hand is the legal principle of stare decisis, that states once the Supreme Court issues a decision, that decision will be honored by all future Supreme Courts. Since the Argentine Supreme Court in 1992 upheld then-President Menem's decision to grant pardons to Riveros and other military officials, the current Supreme Court should honor that decision, she argued. (Note: Soon after the military

junta came to power in March 1976, the military junta arrested Argibay without formal charges and imprisoned her until December of that year. She is by no means a conservative force on the Court. In fact, Argibay told Ambassador on July 18 that the "easy thing for me to have done, given my experience, was to have voted in favor of the decision; but it really was not the right decision.")

Comments from Constitutional Law Experts

¶12. (C) One Constitutional law expert, Gregorio Badeni, stated that in addition to undermining the concept of stare decisis, the decision weakens the legal principle that laws cannot be applied retroactively (i.e., ex post facto). He notes that when the human rights violations took place, Argentina was not a signatory to some of the treaties and international agreements cited in the Court's decision. Another legal scholar, Daniel Sabsay, disagreed with this line of reasoning, arguing that in cases such as these, international treaties prevail regardless of the fact that a previous Argentine Supreme Court had upheld the pardons. He agrees with the Supreme Court's ruling, but noted that the international treaties define crimes against humanity as acts that can be committed by state and non-state actors alike. Hence, Sabsay argues that the decision should apply to

pardons granted to ex-guerillas who also committed human rights violations during the dictatorship.

Decision Prompts Two Cases from ex-Military Families...

¶13. (U) Sabsay is not the only one who believes the decision to annul pardons should apply to ex-guerillas. Ana Lucioni, founder of the Commission to Pay Permanent Homage to the Victims of Subversion, recently filed a petition with the federal courts calling for an investigation into individuals linked to the Montoneros. She not only seeks an investigation into the assassination of her father, who was a First Lieutenant when he was assassinated in 1976, but also into the case of Colonel Argentino del Valle Larrabure, who was kidnapped and tortured for over a year by the People's Revolutionary Army (Ejercito Revolucionario del Pueblo or ERP) in August 1974 during Isabel Peron's presidency.

¶14. (U) The local press quotes Lucioni as saying that the decision to only annul pardons granted to military officials, not only applies the law retroactively, but also selectively, "based on one's ideology or political position." Even under this strict criteria, however, La Nacion (one of the two local papers of record) notes that a number of Montoneros could still be tried, as several current government officials in their own first-hand accounts of the "Dirty War" era have stated that they provided intelligence or logistical support to the Montoneros while they worked for the federal or provincial governments at the time. Lucioni's petition has been filed with lower Federal Court Investigating Judge Daniel Rafecas, who is currently investigating the human rights abuses committed by the Army's First Corps (Primer Cuerpo del Ejercito).

...But Federal Judge Believes It's a Political Ploy

¶15. (C) On July 17, Judge Daniel Rafecas told us that he believes Lucioni's petition is more a political ploy than a solid case. He does not think the Supreme Court's decision can be applied to ex-guerillas, since he interprets international law as stipulating that only states can perpetrate crimes against humanity. He opined that only non-state actors that have been deliberately backed by the State, either through acts of commission or omission, can be tried for crimes against humanity (e.g., paramilitary groups such as the Triple Alliance). He dismissed the argument that both the military and ex-guerillas should be equally tried and held accountable for crimes committed during the 1970s, claiming that 90 percent of the guerrilla's perpetrators, abettors, accessories after the fact, and others, were held accountable by the military dictatorship at the time and were either killed, kidnapped, tortured or disappeared. In his view, criminal acts committed by the guerillas can not be prosecuted as they are subject to statute of limitations, i.e., the military dictatorship had the opportunity, but failed to prosecute, the remaining members of the guerilla movement. When asked whether these arguments would apply to individuals who facilitated acts of terrorism, such as the 1992 Israeli Embassy bombing or the 1994, Rafecas did not rule out the possibility of trying non-state actors for acts of terrorism.

Comment

¶16. (C) Given that many have described the Kirchner administration as the political coming of age of the Montoneros, many sectors in Argentine society find it difficult to see the Court's decision as completely impartial. Our conversations with Argentines from all walks of life indicate that, while most believe that officials that perpetrated human rights violations during the Dirty War era should be brought to justice, a significant minority believes that the guerillas should also be held equally accountable for their crimes during the same era. Still others believe

that Argentina should let sleeping dogs lie.

¶17. (C) If Argentine society really begins to take Kirchner's calls for "no impunity" to task, it will be interesting to see just how far the Argentine government and society will go to uncover the truth. Sufficient evidence has been uncovered to seek extradition of former President Isabel Peron (who was also President Juan Domingo Peron's third wife and Vice President, who assumed office following his death in 1974) for allegedly authorizing the first extrajudicial abuses committed by the right-wing paramilitary group the Triple Alliance. Should the GOA investigate far enough, it and Argentine society may have to face the possibility that Peron, himself, authorized such tactics during his last months in office in the face of escalating political violence--potentially discrediting the myth that is Peron and the underlying political system he created that still persists today.

¶18. (C) While the Court's recent decision is an important step in trying to enforce accountability for Dirty War excesses, it still leaves unaddressed the question of dealing with the murders and assassinations committed by leftist guerilla groups such as the Montoneros. This decision and subsequent trials are unlikely to cause a political backlash in the Argentine military, since the generation implicated in these crimes is largely out of the military and today's military is a professional force, fully subordinate to civilian authority. That said, contacts have told us that many lower-ranking military officials are leaving the military as they do not see much of a future in an institution that has served as Kirchner's political whipping boy since taking office. (Note: Defense Minister Garre announced on July 16 that the Congress is currently considering a draft law that would create an Armed Forces Ombudsman's Office, which would receive claims against military personnel.)

End Comment.

WAYNE